LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 4 1969
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No.... [redacted] 31

STATE OF OHIO ex. rel. PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY,
ROBERT HUGHES, SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

MOTION TO DISMISS

PAUL W. BROWN
Attorney General

CHARLES S. LOPEMAN
First Assistant Attorney General

JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215

Attorneys for Appellees
James A. Rhodes, Ted W. Brown
and William B. Saxbe.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	4
CONCLUSION	5
APPENDIX	

TABLE OF AUTHORITIES

Page

Cases

Glen A. Williams, et al. v. *James A. Rhodes, et al.*, No. 543, October Term, 1968, U.S. Supreme Court .. 5

Statutes

Section 3513.05, Revised Code .....2, 4, Appendix

Section 3513.257, Revised Code 2, 4, 5

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

No......

STATE OF OHIO ex. rel. PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY,
ROBERT HUGHES, SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

MOTION TO DISMISS

Appellees James A. Rhodes, Governor of the State of Ohio, Ted W. Brown, Secretary of State of Ohio, and Paul W. Brown, Attorney General of Ohio, pursuant to Rule 16 (1) of the Revised Rules of the Supreme Court of the United States, move this Court to dismiss this appeal on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

On July 10, 1968, Appellant Paul W. Brockington filed a petition in mandamus in the Common Pleas Court of Cuyahoga County, Ohio. He named Governor James A. Rhodes, Secretary of State Ted W. Brown, Attorney Gen-

eral William B. Saxbe, and the Members and Director of the Cuyahoga County Board of Elections as Respondents in the action, in their representative capacities.

Appellant's petition stated that he was an independent candidate in the November 5, 1968, election for the United States House of Representatives from Ohio's 21st Congressional District. On or about February 19, 1968, he filed nominating petitions bearing 899 valid signatures with the Board of Elections pursuant to Section 3513.05, Revised Code. (Appendix, pp. 1a-6a).

The nominating petitions were rejected by the Board of Elections because the number of valid signatures contained in them were not sufficient in light of Section 3513.257, Revised Code. (Jurisdictional Statement, pp. 3-4)

Appellant was informed of the rejection by a letter dated June 26, 1968. After a hearing, the Board reaffirmed its decision.

Appellant's petition stated his claim in this case as follows, in paragraph 12 of his petition:

> "Relator says that the said seven percent requirement is unreasonably high and excessive, that it is disproportionate when compared to the 100 signatures required for party candidates, that it is arbitrary and capricious, that it constitutes an invidious discrimination without any relationship to constitutionality justified ends, that its effect is to disfranchise relator and other independent voters, and that it is therefore unconstitutional and void."

The relief requested in the Common Pleas Court was that the Court order the Board of Elections to certify the sufficiency of Appellant's nominating petition and to place his name on the ballot as a qualified independent candidate for the United States House of Representatives from Ohio's 21st Congressional District, and that the Court order all Appellees herein to do all things necessary to place Ap-

pellant's name on the ballot as an independent candidate, or show cause why they should not be required to do so.

The Respondent Board of Elections demurred to the petition, asserting that no cause of action in mandamus was stated. The Respondents Rhodes, Brown and Saxbe, appearing specially, filed a motion to quash. The demurrer and the motion were overruled on July 30, 1968, and answers were duly filed.

The hearing on the merits was held in the Common Pleas Court on August 6, 1968, the Court noting the continuing objection of Appellees Rhodes, Brown and Saxbe to its jurisdiction over them.

On August 22, 1968, the Common Pleas Court issued its order denying the requested writ of mandamus, on the ground that Appellant had not shown a clear legal right to the relief requested. Notice of appeal to the Court of Appeals was filed August 27, 1968.

On September 9, 1968, the Court of Appeals heard Appellant's motion to advance and motion for temporary injunction. It denied the motion for temporary injunction.

The Court of Appeals heard the case on the merits on September 27, 1968, and on October 1, 1968, affirmed the judgment of the Common Pleas Court, on the grounds that it found no error prejudicial to Appellant, and that Appellant had not shown a legal right to the relief requested.

On October 2, 1968, Appellant filed his notice of appeal to the Supreme Court of Ohio, alleging the existence of substantial constitutional questions under Amendment XIV of the United States Constitution.

On October 23, 1968, following the submission of briefs and the hearing of oral argument, the Supreme Court of Ohio dismissed Appellant's appeal *sua sponte* "for the reason that no substantial constitutional question exists herein."

ARGUMENT

As is evident from paragraph 12 of his petition, Appellant has, throughout this litigation, asserted the claim that Section 3513.257, *supra*, is unconstitutional because Section 3513.05, *supra*, requires a minimum of only 100 valid signatures on the nominating petition to qualify for a position as a congressional candidate on the primary ballot of a recognized political party in Ohio, while Section 3513.257, *supra*, requires that an independent Congressional candidate submit a nominating petition containing valid signatures of not less than seven percent of the number of electors who voted at the last election for governor.

Appellant has, in effect, attempted to equate the task of becoming a candidate of a political party on its ballot at a primary election with the task of an independent becoming a candidate on the ballot of an ensuing general election. This comparison is invalid because it involves two separate and distinct steps in the electoral process, and it is repeated again in footnote 1 at page 4 of the jurisdictional statement in this appeal. The tasks which may properly be equated are the tasks of becoming an independent candidate at a general election and the task of becoming the candidate of a political party at a general election. When viewed from this standpoint, it is clear that which is more difficult depends on more than the number of signatures on a candidate's nominating petition, including the conditions and circumstances in any given area at a given time. It can be argued that it would seem more difficult, in terms of requiring more time, effort and money, to become a party candidate at a general election by means of participating in a primary than it is to become an independent candidate at a general election by collecting a certain number of signatures on a nominating petition.

Additionally, Appellees point out that the election at which Appellant sought to be a candidate has passed, and the questions presented by his appeal are moot, and need not necessarily be answered at the present time. This is especially so because the Ohio General Assembly is at present conducting a comprehensive review of the election laws of this State, in light of the decision of this Court in *Glen A. Williams, et al. v. James A. Rhodes, et al.* (No. 543, October Term, 1968). Appellant's argument in regard to the effect of Section 3513.257, *supra*, on any future election is therefore, merely conjectural.

Further, Appellees suggest to the Court that Paul M. Brown, who has succeeded to the office of Attorney General of Ohio, be substituted for William B. Saxbe as a party appellee herein.

CONCLUSION

Appellees urge that this Motion to Dismiss be sustained for the reasons heretofore stated.

Respectfully submitted,

PAUL W. BROWN
Attorney General

CHARLES S. LOZEMAN
First Assistant Attorney General

JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215

Attorneys for Appellees
James A. Rhodes, Ted W. Brown
and William B. Saxbe,

APPENDIX

Section 3513.05, Ohio Revised Code — Declarations of candidacy; certification of form of ballots on nominations.

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election shall, not later than four p. m. of the ninetieth day before the day of such primary election, file a declaration of candidacy and petition, and pay the fee required by section 3513.10 of the Revised Code. Such declaration of candidacy, petition, and all part petitions shall be filed at the same time as one instrument.

If the declaration of candidacy declares a candidacy which is to be submitted to electors throughout the entire state, the petition shall be signed by at least one thousand qualified electors who are members of the same political party as the political party of which the candidate is a member, from at least one third of the counties of the state, and such declaration of candidacy and petition shall be filed with the secretary of state; provided that the secretary of state shall not accept or file any such petition appearing on its face to contain the signatures of more than five thousand electors.

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a district comprised of more than one county but less than all of the counties of the state, the petition shall be signed by at least one hundred qualified electors of such district who are members of the same political party as the political party of which the candidate is a member, or by such electors equal in number to at least five per cent of the number of votes cast for the candidate for governor of the same political party in such district at the next preceding regular state election if such five per cent is less than one hundred,

and such declaration of candidacy and petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors.

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a county or a congressional district smaller than a county, the petition shall be signed by at least one hundred qualified electors of such county or district who are members of the same political party as the political party of which the candidate is a member, or by such electors equal in number to at least five per cent of the number of votes cast for the candidate for governor of the same political party in such county or district at the next preceding regular state election if such five per cent is less than one hundred, and such declaration of candidacy and petition shall be filed with the board of the county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors.

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a subdivision smaller than a county, the petition shall be signed by at least five qualified electors of such subdivision who are members of the same political party as the political party of which the candidate is a member, and such declaration of candidacy and petition shall be filed with the board of the county within which such subdivision is located; or within which the major portion of the population thereof, as ascertained by the next preceding federal census, is located, if the subdivision is situated in more than one

county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than twenty-five electors. A petition filed with a declaration of candidacy of a candidate for election as a member of the state central committee or the county central committee of a political party shall be signed by five, but not more than twenty-five, qualified electors of the district, county, ward, township, or precinct within which electors may vote for such candidate. The electors signing such petition shall be members of the same political party as the political party of which the candidate is a member. They shall sign such petition in the presence of a notary public or other official authorized to administer oaths, and such official shall certify thereon that each of such signatures was placed thereon in his presence.

Petitions containing signatures of electors of more than one county shall consist of separate petition papers each of which shall contain signatures of electors of only one county. Petitions containing signatures of electors of more than one county shall not thereby be declared invalid. In case petitions containing signatures of electors of more than one county are filed, the board shall determine the county from which the majority of signatures came, and only signatures from this county shall be counted. Signatures from any other county shall be invalid.

Each separate petition paper shall be circulated by one person only, who shall be a member of the same political party as the candidate, and who shall affirm before a person authorized to administer an oath that each of the signatures affixed thereto is the signature of the person whose signature it purports to be, and that each of such signers affixed his signature in the presence of the circulator.

The secretary of state shall promptly transmit to each board such separate petition papers of each petition ac-

companying a declaration of candidacy filed with him as purport to contain signatures of electors of the county of such board. The board of the most populous county of a district shall promptly transmit to each board within such district such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the county of each such board. The board of a county within which the major portion of the population of a subdivision, situated in more than one county, is located, shall promptly transmit to the board of each other county within which a portion of such subdivision is located such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the portion of such subdivision in the county of each such board.

All petition papers so transmitted to a board and all petitions accompanying declarations of candidacy filed with such board shall, under proper regulations, be open to public inspection, until four p. m. of the eighty-fifth day before the day of the next primary election. Each board shall, not later than the eighty-fourth day before the day of such primary election, examine and determine the validity or invalidity of the signatures on the petition papers so transmitted to or filed with it and shall return to the secretary of state all petition papers transmitted to it by the secretary of state, together with its certification of its determination as to the validity or invalidity of signatures thereon, and shall return to each other board all petition papers transmitted to it by such board, together with its certification of its determination as to the validity or invalidity of the signatures thereon. All other matters affecting the validity or invalidity of such petition papers shall be determined by the secretary of state or the board with whom such petition papers were filed.

Protests against the candidacy of any person filing a declaration of candidacy for party nomination or for election to an office or position, as provided in this section, may be filed by any qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy he objects to, or by the controlling committee of such party. Such protest must be in writing, and must be filed not later than four p. m. of the eightieth day before the day of the primary election. Such protest shall be filed with the election officials with whom the declaration of candidacy and petition was filed. Upon the filing of such protest the election officials with whom it is filed shall promptly fix the time for hearing it, and shall forthwith mail notice of the filing of such protest and the time fixed for hearing it to the person whose candidacy is so protested. They shall also forthwith mail notice of the time fixed for such hearing to the person who filed the protest. At the time fixed such election officials shall hear the protest and determine the validity or invalidity of the declaration of candidacy and petition. If they find that such candidate is not an elector of the state, district, county, or political subdivision in which he seeks a party nomination or election to an office or position, or has not fully complied with sections 3513.01 to 3513.32, inclusive, of the Revised Code, his declaration of candidacy and petition shall be determined to be invalid and shall be rejected, otherwise it shall be determined to be valid. Such determination shall be final.

The secretary of state shall, on the seventy-fifth day before the day of a primary election, certify to each board in the state the forms of the official ballots to be used at such primary election, together with the names of the candidates to be printed thereon whose nomination or election

is to be determined by electors throughout the entire state and who filed valid declarations of candidacy and petitions.

The board of the most populous county in a district comprised of more than one county but less than all of the counties of the state shall, on the seventy-fifth day before the day of a primary election, certify to the board of each county in the district the names of the candidates to be printed on the official ballots to be used at such primary election, whose nomination or election is to be determined only by electors within such district and who filed valid declarations of candidacy and petitions.

The board of a county within which the major portion of the population of a subdivision smaller than the county and situated in more than one county is located shall, on the seventy-fifth day before the day of a primary election, certify to the board of each county in which a portion of such subdivision is located the names of the candidates to be printed on the official ballots to be used at such primary election, whose nomination or election is to be determined only by electors within such subdivision and who filed valid declarations of candidacy and petitions.

* HISTORY: 130 v 827, §1. Eff 1-1-64.